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NO. 87-1989

in the

Supreme Court

of the

United States of America

OCTOBER TERM, 1987

THEODORE B. GOULD, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and MIAMI CENTER CORPORATION,

Petitioners.

On Petition for Writ of Mandamus to the United States Bankruptcy Court, Southern District of Florida, Chief Judge Thomas C. Britton and Senior Judge Sidney M. Weaver

BRIEF IN OPPOSITION OF THE BANK OF NEW YORK

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QUESTIONS PRESENTED

Under the heading "Questions Presented", the Petitioners present four pages summarizing, in no logical manner, various substantive rulings issued by the Bankruptcy Court for the Southern District of Florida, the District Court for the Southern District of Florida, and the Eleventh Circuit Court of Appeals. The Petitioners then submit five "Questions" and nine "Issues" which dispute and reargue the substantive decisions of those Courts. The Petitioners do not address the pertinent questions which this Court should consider in determining whether to grant a writ of mandamus. The Bank of New York submits that the proper questions before this Court are as follows:

1. Should this Court exercise its discretion and refuse to consider the Petition for Writ of Mandamus because the Petitioners are merely using this proceeding as a forum to reargue substantive legal issues and improperly supplement their pending Petition for Writ of Certiorari?

2. Have the Petitioners established that the granting of the Writ of Mandamus will be in aid of this Court's appellate jurisdiction?

3. Have the Petitioners established that there are present exceptional circumstances warranting the exercise of this Court's discretionary powers in granting the Writ of Mandamus?

4. Have the Petitioners established that adequate relief cannot be had in any other forum or from any other court?

PARTIES TO PROCEEDING BELOW

The Petitioners are Theodore B. Gould, Holywell Corporation, Miami Center Limited Partnership, Chopin Associates, and Miami Center Corporation. The Respondents are the Judges of the United States Bankruptcy Court for the Southern District of Florida who participated in the proceedings below: Chief Bankruptcy Judge Thomas C. Britton and Senior Bankruptcy Judge Sidney M. Weaver.

The Bank of New York, a New York banking corporation (the "Bank"), and Fred Stanton Smith, Liquidating Trustee of the Miami Center Liquidating Trust (the "Trustee"), are interested parties.

The Judges (non-respondents) in the United States District Court for the Southern District of Florida who have heard appeals and/or motions in the Chapter 11 case were Judge Sidney M. Aronovitz, Judge William M. Hoeveler, Chief Judge James Lawrence King, Senior Judge C. Clyde Atkins, Judge Norman C. Roettger, Jr., Judge James W. Kehoe, Judge Kenneth L. Ryskamp, Judge Lenore C. Nesbitt, Judge Edward B. Davis, Judge Stanley Marcus, Judge Eugene Spellman, and Judge Thomas C. Scott.

The Judges (non-respondents) in the Eleventh Circuit Court of Appeals who have heard appeals in the Chapter 11 proceedings are Judges Anderson, Godbold, Tjoflat, Hatchett, and Vance. In addition, Judge Swygert of the Seventh Circuit Court of Appeals and Judge Brown of the Fifth Circuit Court of Appeals have sat by designation on panels of the Eleventh Circuit.

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On Petition for Writ of Mandamus to the United States Bankruptcy Court, Southern District of Florida, Chief Judge Thomas C. Britton and Senior Judge Sidney M. Weaver

BRIEF IN OPPOSITION OF THE BANK OF NEW YORK

STATEMENT OF THE CASE

This Petition for Writ of Mandamus is related to the actions of two judges in the Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court"), Chief Bankruptcy Judge Thomas C. Britton ("Judge Britton") and Senior Bankruptcy Judge Sidney M. Weaver ("Judge Weaver").

On August 8, 1985, Judge Britton entered an order (the "Confirmation Order") confirming an Amended and Consolidated Plan of Reorganization (the "Plan") filed by The Bank of New York (the "Bank").[1] The central features of the Plan were:

(a) the substantive consolidation of the estates of the five debtors;

(b) creation of the Miami Center Liquidating Trust (the "Liquidating Trust") consisting of all Bankruptcy Code §541 assets of the debtors for the payment of creditor claims by a Court appointed Liquidating Trustee (the "Liquidating Trustee");

(c) purchase by the Bank or its designee of the Miami Center Project (the "Project"), including furniture, fixtures, and equipment, for the purchase price representing the appraised value of $255,600,000, which was to be paid by a credit for the amount owed to the Bank (approximately $242,000,000), plus new cash of approximately $13,600,000 representing the balance of the purchase price paid by the Bank;

(d) the release by the Bank to the Liquidating Trustee of its cash collateral in the approximate amount of $30,000,000 for the payment of claims of creditors;

(e) further commitment by the Bank to finance approximately $15,000,000 for payment of the claim of the Miami Center Joint Venture ("MCJV"), a general partnership between Gould and Olympia & York Florida Equity Corp. ("O&Y"), for furniture, fixtures, and equipment leased by MCJV to the Project. (This specific provision was

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[1]Reported at 54 Bankr. 41 (S.D. Fla. 1985), [App. 246a]. References to Petitioners' appendix are denoted "App. ____a."

included in the Plan in the event that the Bank's subordinate classification of the MCJV claim was reversed on appeal and the Liquidating Trustee did not have sufficient assets to pay MCJV's claim.);

(f) the subordinate classification of other affiliated corporations of the debtors; and

(g) dismissal by the Liquidating Trustee of a "lender liability" lawsuit filed by the Petitioners against the Bank.

The Petitioners sought to stay implementation of the Plan pending an appeal to the District Court for the Southern District of Florida (the "District Court"). The Bankruptcy Court conditioned such a stay on the posting of a $140,000,000.00 bond, which was subsequently reduced to $50,000,000.00 by the District Court. The Petitioners failed to post a bond, and on October 10, 1985, the Liquidating Trustee, on behalf of the Liquidating Trust, conveyed title to the Project to a partnership formed by affiliates of the Bank and the other participating banks. The Liquidating Trustee also immediately began to consummate the Plan by marshalling assets, including the additional $15.6 million paid by the Bank, and paying claims of creditors. To date over $25,000,000.00 has been paid to creditors by the Liquidating Trustee.

The Petitioners appealed the Confirmation Order. By Order dated December 30, 1985,[2] the District Court remanded the case to the Bankruptcy Court for entry of specific findings of fact and conclusions of law, and denied the Bank's motion to dismiss the appeal as moot.

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[2]*Holywell Corp. v. The Bank of New York*, order dated December 30, 1985 [App. 65a], Appeal No. 85-3225-Civ-Aronovitz.

On remand, evidentiary hearings were held before Judge Britton who solicited proposed findings of fact and conclusions of law from the Bank and the Petitioners. The Bankruptcy Court adopted the Bank's proposed findings of fact and conclusions of law and incorporated said findings of fact and conclusions of law into the Confirmation Order.[3] On March 20, 1986, the District Court issued an Order affirming the Confirmation Order and Plan.[4] The Petitioners filed an appeal to the United States Court of Appeals for the Eleventh Circuit (the "Court of Appeals") from the Order of the District Court affirming the Confirmation Order. This appeal was consolidated with an appeal from an order entered by District Court Judge Hoeveler dismissing an action filed by the Petitioners against the Bank alleging fraud, RICO violations, and other "lender liability" claims.[5]

On June 29, 1987, a panel of the Eleventh Circuit entered an opinion dismissing the Petitioners' appeal of the Confirmation Order as moot.[6] The Petitioners then filed a Petition for Rehearing with the Court of Appeals which contained numerous errors of fact, including the false claim that neither the Bankruptcy Court or the District Court held that the Bank was a "purchaser in good faith."

The rules of the Court of Appeals did not permit the Bank to submit a response to the Petition for Rehearing. On September 8, 1987, the Court of Appeals issued an opinion denying the Petition for Rehearing, with the sole correction

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[3]*In re Holywell Corp.*, Bankr. Case Nos. 84-01490-94, order dated January 29, 1986 [App. 96a].

[4]Reported at 59 Bankr. 340 (Bankr. S.D. Fla. 1985) [App. 11a].

[5]*Miami Center Ltd Partnership v. The Bank of New York*, order dated April 30, 1986, Case No. 85-0228-Civ-Hoeveler [App. 37a].

[6]Reported at 820 F.2d 376 (11th Cir. 1987) [App. 2a].

"that neither the Bankruptcy Court nor the District Court made an express or implied finding that the Project was sold to a good faith purchaser."[7] This correction was directly contrary to the Bankruptcy Court's prior explicit finding that the Bank was a good faith purchaser. The Bank filed a Petition for Rehearing of the Eleventh Circuit's corrected Decision. The Petitioners then filed a Suggestion for Rehearing en Banc.

On March 10, 1988, the Court of Appeals issued a decision on Petition for Rehearing and Rehearing En Banc,[8] which stated that its previous correction denying the Bank "good faith purchaser" status was in error. The Court of Appeals, after a review of the entire record and all briefs, ruled that the District Court should have dismissed the Petitioners' appeal as moot when it was initially considered and further vacated the judgment of the District Court, which affirmed the Confirmation Order on its merits, remanding the case to the District Court with instructions to dismiss the Petitioners' appeal as moot. The Petitioners have filed a Petition for Writ of Certiorari requesting that this Court review the decision of the Court of Appeals. That Petition is pending before this Court under Case Number 87-1988 (the "Petition for Certiorari"). In addition, the Petitioners filed a Petition for a Writ of Prohibition and Mandamus dated December 23, 1987 with the Court of Appeals seeking the identical relief sought here with respect to the prior decisions of the Bankruptcy Court. The Court of Appeals denied this Petition for Writ of Prohibition and Mandamus without opinion on January 22, 1988. [App. 1a].

Simultaneously with the appeal of the Confirmation Order, a number of proceedings were instituted in the

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[7]Reported at 826 F.2d 1010 (11th Circuit 1987) [App. 40a].

[8]Reported at 838 F.2d 1547 (11th Cir. 1988) [App. 42a].

Bankruptcy Court directly relating to the provisions of the Plan, and the Bankruptcy Court issued orders in these related proceedings which were subsequently appealed by the Petitioners.[9] For example, the Bankruptcy Court issued an order ruling that the cash of Twin Development Corporation ("Twin"), a wholly-owned subsidiary of the Petitioner, Holywell, was vested in the Liquidating Trust under the Plan. The Petitioners, Gould and Holywell, appealed this Order to the District Court, which affirmed the holding of the Bankruptcy Court.[10] The Petitioners then appealed the District Court Order to the Eleventh Circuit, which affirmed the decision of the District Court and labeled the Petitioners' legal arguments as "frivolous."[11] Now the Petitioners argue that this same decision of the Bankruptcy Court, which the District Court and the Court of Appeals fully reviewed and affirmed on its merits, represents such an abuse of discretion by the Bankruptcy Court as to warrant the issuance of a writ of mandamus by this Court.

The Petition is replete with other references to specific orders entered by the Bankruptcy Court in proceedings related to the Confirmation Order.[12] In each case, the Petitioners have been afforded appellate review of the Bankruptcy Court's order, or appellate review is pending.

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[9]Over twenty separate appeals from rulings of the Bankruptcy Court have been filed by the Petitioners. Ten different judges of the District Court have heard these appeals.

[10]*Holywell Corp. v. The Bank of New York*, order dated February 20, 1987, Appeal No. 86-0848-Civ-Ryskamp [App. 190a].

[11]*Holywell Corp. v. Smith*, opinion dated March 18, 1988, 11th Cir. Case No. 87-5195 [App. 200a].

[12]Pet. p. i-iv. All references to specific provisions of the Petition for Writ of Mandamus are denoted as "Pet. p.____."

SUMMARY OF ARGUMENT

The Petition for a Writ of Mandamus to the Bankruptcy Court should be denied. The same Petitioners have filed with this Court the Petition for Certiorari to review and reverse the decision of the Court of Appeals which directed the District Court to dismiss, as moot, the Petitioners' appeal of the Confirmation Order. In considering the Petition for Certiorari, this Court's review should be limited to the ruling of the Court of Appeals directing the District Court to dismiss the Petitioners' appeal as moot. The Petitioners, faced with this narrow legal issue, have apparently instituted this Petition for Writ of Mandamus in an attempt to improperly supplement their Petition for Certiorari by presenting to this Court substantive legal arguments which are beyond the scope of the mootness issue.

The Petitioners do not identify and analyze the criteria which this Court should consider in determining whether to issue a writ of mandamus. The Petitioners do not establish that *any* circumstances exist to warrant the issuance of a writ of mandamus. The Petitioners present a mixed bag of substantive legal arguments all of which have been previously asserted in various proceedings. The Petition is totally devoid of any examples of conduct on the part of the Bankruptcy Court which would warrant the extraordinary remedy of the granting of a writ of mandamus. The same substantive rulings of the Bankruptcy Court, which the Petitioners claim represent an unlawful exercise of the Bankruptcy Court's prescribed jurisdiction and an abuse of its power, have either been affirmed by the District Court,[13]

[13]59 Bankr. 340 (S.D. Fla. 1986) [App. 11a]. The Court of Appeals stated that the District Court conducted a careful point-by-point review of the findings of fact and conclusions of law of the Bankruptcy Court and found no error. 838 F.2d 1547, 1552 [App. 53a].

or represent related rulings of the Bankruptcy Court which have been affirmed on appeal, or are pending hearing on appeal.

ARGUMENT

I.

The Petition for Writ of Mandamus Should be Denied Because the Petitioners are Improperly Using This Mandamus Proceeding to Supplement Their Petition for Writ of Certiorari.

A review of the Petition reveals no valid legal arguments to support the granting of a writ of mandamus. The Petitioners make no attempts to identify and analyze the criteria for the issuance of a writ of mandamus by this Court. In fact, there is not one citation in the Petition to Rule 26 of the United States Supreme Court Rules, the specific authority which defines those circumstances under which the Court will issue a writ of mandamus.

The total lack of any reasonable legal arguments to support the granting of a writ of mandamus indicates that the Petitioners are improperly using this proceeding as a forum to supplement their Petition for Certiorari. The Petition for Certiorari is limited to the review of whether the Court of Appeals properly directed the District Court to dismiss, as moot, the Petitioners' appeal of the Confirmation Order. Consequently, Petitioners' substantive arguments attacking the Confirmation Order are not properly before this Court in connection with their Petition for Certiorari. However, the Petitioners, in the guise of a Petition for a Writ of Mandamus, have raised the same litany of substantive legal arguments which are found in their briefs submitted to the District Court and Court of Appeals. In addition, the Petitioners have apparently sought to create an improper

record before this Court by submitting an appendix to their Mandamus Petition containing items which could not be included as part of the Appendix to the Petition for Certiorari.

It is particularly offensive that the Petitioners have included, as their Appendix No. 32, a 66-page document entitled "Errors of Fact and Law" which was prepared by the Petitioner Gould, a non-lawyer. This is a self-serving compilation of the personal opinions of Mr. Gould attacking the decisions of the Bankruptcy Court, District Court, and Court of Appeals, which has not been subject to rebuttal and which is not part of the record of any judicial proceeding. This document characterizes the true purpose of the Petition for Writ of Mandamus, i.e., to provide the Petitioners with a forum to reargue before this Court every decision, unfavorable to the Petitioner, entered by the Bankruptcy Court, the District Court, and the Court of Appeals. This is a transparent abuse of mandamus review, and this Court should summarily deny the Petition.

II.

The Petition Does Not Meet the Statutory Criteria for Granting a Writ of Mandamus.

The statutory authority for the issuance of a writ of mandamus has its origins in the All Writs Act, 28 U.S.C. §1651(a) which reads:

> [T]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

A writ of mandamus is an extraordinary and drastic remedy. *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 108

S.Ct. 1133 (1988); *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 106 (1967); *Ex parte Fahey*, 332 U.S. 258, 259 (1947). Mandamus is only appropriate to confine an inferior court to the lawful exercise of its jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Oswald v. McGarr*, 620 F.2d 1190 (6th Cir. 1980).

The petitioning party has the "burden of showing that [his] right to issuance of the writ [of mandamus] is 'clear and indisputable.' " *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (*quoting United States v. Dvell*, 172 U.S. 576, 582 (1899)). The record must support the party's petition for a writ of mandamus. *Will v. United States*, 389 U.S. 90, 98 (1967); *Ex parte Muir*, 254 U.S. 522, 532 (1921).

Rule 26 of the United States Supreme Court Rules directly governs the issuance of a writ of mandamus by the Supreme Court. It states:

> The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right but of *discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in the aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.* [Emphasis supplied.]

The requirements of Rule 26 must be read in the conjunctive. The failure to satisfy any part of Rule 26 mandates the denial of the writ. However, the Petitioners fail to establish any one of the three criteria set forth in Rule 26.

(a) The Issuance of a Writ of Mandamus Will Not Aid the Court's Appellate Jurisdiction.

The issuance of a writ of mandamus will not aid this Court's appellate jurisdiction. In fact, the issuance of a writ of mandamus would hinder and would be inconsistent with the exercise of this Court's appellate jurisdiction because the relief sought by the Petitioners would render ineffective the very same Confirmation Order which is the subject of the Petition for Certiorari. The Petitioners request the following relief on page 29 of their Petition:

> (i) an order directing Chief Bankruptcy Judge Thomas C. Britton to vacate as a nullity the order of substantive consolidation and findings of fact adopted in toto on remand; and
>
> (ii) an order directing Senior Bankruptcy Judge Sidney M. Weaver to:
>
> — dissolve the Miami Center Trust,
>
> — vacate the order appointing a Trustee,
>
> — vacate the order that the Bank of New York was not undersecured,
>
> — redistribute the Miami Center Sales proceeds in accordance with the proper legal priorities, and limit the Bankruptcy Court to the exercise of its prescribed jurisdiction as the administration of timely filed pre-petition claims.

The relief sought by the Writ of Mandamus would decide substantive issues in connection with a matter before

this Court and actually change the Confirmation Order. The Petition for Certiorari requests that this Court review the decision of the Court of Appeals directing the District Court to dismiss the appeal of the Confirmation Order. If certiorari is not granted, all aspects of the Confirmation Order and all provisions of the Plan will be insulated from further appellate review or collateral attack.

The Petition does not demonstrate how the issuance of the writ of mandamus to compel the vacating or reversal of the various orders of the Bankruptcy Court will aid the Court's exercise of its appellate jurisdiction.

In considering whether to issue a writ of mandamus, the Supreme Court *should not* decide any questions as to the merits of the underlying issues. *Ex parte Fahey*, 332 U.S. 258, 259 (1947); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27 (1943). The remedy of mandamus is not a substitute for an appeal. *Fahey*, 332 U.S. at 260.

To grant the Petitioners' request for Writ of Mandamus would not aid this Court's appellate jurisdiction but would, in fact, harm and hinder such jurisdiction because the relief sought by the Petition for Writ of Mandamus would dismantle the provisions of the Confirmation Order before this Court can rule on whether that same Order should be subject to further review. The granting of the Writ of Mandamus would destroy, rather than preserve, the status quo pending an appeal to this Court, and produce a result contrary to the specific intent of Rule 26.

(b) The Petitioners Have Not Demonstrated "Exceptional Circumstances" to Warrant the Issuance of a Writ of Mandamus.

Exceptional circumstances are present where there is an "usurpation of judicial process" or "clear abuse of

discretion by a lower court." *Roberts v. United States Dist. Court for the N. Dist. of Cal.*, 339 U.S. 844, 845 (1950); *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976); *Oswald v. McGarr*, 620 F.2d 1190 (4th Cir. 1980); *Commonwealth v. Newcomer*, 618 F. 2d 246 (3d Cir. 1980). Mandamus does not run the gauntlet of reversible error, and it is not to be used to control decisions of the trial court, but merely to confine the trial court to its sphere of discretionary power. *Will v. United States*, 389 U.S. 90 (1967).

None of the alleged conduct of the Bankruptcy Court, cited by the Petitioners, warrants the granting of a writ of mandamus. A writ of mandamus is not a proper means of controlling the discretion of the Bankruptcy Court acting within the scope of its judicial discretion and the Bankruptcy Court simply did not act outside of the scope of its jurisdiction. In fact, the reasons cited by the Petitioners for granting mandamus are nothing more than the same substantive arguments relating to alleged errors of law by the Bankruptcy Court. These reasons, as set forth and analyzed below, fall far short of the "exceptional circumstances" standard of Rule 26.

(i) Alleged Failure to Hold a Confirmation Hearing. [Pet. p. 15]

Petitioners have consistently argued that the failure to hold a hearing subsequent to the amendment of the Plan[14] violated their right to due process of law. The District Court rejected this legal argument in *In re Holywell Corp.*, 59 Bankr. 340, 352 (S.D. Fla. 1986) [App. 11a], where it considered the Petitioners' argument that a hearing was not held subsequent to the amendment of the Plan:

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[14]Numerous hearings were held during the confirmation process and all parties were given ample opportunity to supplement the record before the Bankruptcy Court on Confirmation. *In re Holywell Corp.*, Bankr. Case Nos. 84-01490-94, order dated January 29, 1986 [App. 108a].

"(5) *Amendment to the Plan of Reorganization Without Issuance of Disclosure Statements or Hearing*

In the last of their original issues on appeal, the debtors objected to the fact that late modifications to the Bank's Reorganization Plan were adopted shortly before entry of the Confirmation Order. These modifications (CP 564, 614, 709c, and 854) consisted of stipulations and amendments to the plan as filed. The purpose of these modifications was to provide for a trustee's certificate to repay the Bank of New York for any outlay required to acquire the FF & E which was the subject of the "A" and "B" leases. The Bankruptcy Court concluded (Order on Remand, ¶No. 81) that these modifications did not prejudice the debtors, and that since the plan had been approved by the requisite number of creditors, disclosure to those classes which had rejected the plan was not required by 11 U.S.C. § 1127.

This Court agrees with the Bankruptcy Court's conclusion that the adoption of amendments to the plan of reorganization subsequently confirmed by that court did not violate the applicable provision of the Bankruptcy Code, did not prejudice these appellants, and therefore does not constitute a basis for reversing the Confirmation Order.

(ii) Alleged Lack of Jurisdiction Over Assets of Subsidiaries. [Pet. p. 16]

Petitioners argued that the Bankruptcy Court exceeded its jurisdiction in ruling that the Twin cash could

be utilized by the Liquidating Trustee under the Plan.[15] This argument was rejected by the District Court and by the District Court of Appeals.[16] Petitioners also argue that the Bankruptcy Court exercised improper control over the assets of Holywell Leasing Company and Holywell Telecommunications Company, in ruling that assets of these wholly-owned subsidiaries of Holywell were acquired pursuant to the Plan. These issues are still subject to review pursuant to an appeal presently pending before District Judge Kehoe.[17]

(iii) Alleged Misapplication of Mootness Doctrine. [Pet. p. 17]

This argument has no relevance to any action of the Bankruptcy Court. The Court of Appeals issued a substantive legal ruling that the appeal should be dismissed as moot. *Miami Center Ltd Partnership v. The Bank of New York*, 838 F.2d 1547 (1988) [App. 42a]. The Petitioners suggest that Bankruptcy Judge Britton somehow anticipated this ruling and engaged in conduct which actually prejudiced the Petitioners. This is not the case. There is absolutely no evidence of conduct on the part of Judge Britton which shows actual prejudice towards the Petitioners. This fact was stated in the Opinion of Judge Atkins who ruled that although Judge Britton should recuse himself from the case, there was absolutely no indication that Judge Britton acted improperly in any aspect of the bankruptcy case.[18]

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[15]*In re Holywell Corp.*, Bankr. Case Nos. 84-01490-94, order dated January 28, 1986.

[16]*See Holywell Corp. v. The Bank of New York*, order dated February 20, 1987, Appeal No. 86-0848-Civ-Ryskamp, [App. 190a] and *Holywell Corp. v. Smith*, opinion dated March 18, 1988, in 11th Circuit Case No. 87-5195 [App. 200a].

[17]*Holywell Telecommunications Co. v. The Bank of New York*, Appeal No. 85-3431-Civ-Kehoe.

[18]*Olympia & York Florida Equity Corp. v. The Bank of New York*, opinion dated August 27, 1987 in Appeal No. 85-3230-Civ-Atkins.

(iv) Adoption of the Bank's Findings of Facts and Conclusions of Law. [Pet. p. 18]

The Petitioners have repeatedly challenged the Bankruptcy Court's verbatim adoption of the Bank's proposed findings of fact and conclusions of law and the incorporation of those findings and conclusions into the Confirmation Order.

The District Court has considered this argument and has indicated that although it did not approve of the Bankruptcy Court's action, this action, *per se*, does not warrant a reversal of the Confirmation Order:

> [T]he Court is also aware of the United States Supreme Court's ruling in *Anderson v. Bessemer City*, 470 U.S. ____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). There, while disapproving of the practice of adopting unchanged the proposed findings and conclusions of a party, the Court noted that such findings "nevertheless . . . are those of the Court and may be reversed only if clearly erroneous." 105 S.Ct. at 1511. Thus, whether this Court approves of the procedure followed by Judge Britton upon remand in this appeal is not determinative. In light of the ruling in *Anderson*, but with a clear appreciation of the admonition of the Eleventh Circuit in *Cabriolet Porsche-Audi*, this court has given close scrutiny to the findings of fact adopted below, but within the scope allowed such review by the "clearly erroneous" standard of Bankruptcy Rule 8013.

In re Holywell Corp., 59 Bankr. 340, 344 n.3 (S.D. Fla. 1986).

(v) Appointment of Liquidating Trustee and Creation of A Liquidating Trust. [Pet. p. 21-23]

Petitioners argue that the Bankruptcy Court acted outside the scope of its statutory authority in confirming the Plan because the Plan provided for the creation of the Liquidating Trust and the appointment of a Liquidating Trustee. This substantive argument is wrong on the merits[19] and has been rejected by the Court of Appeals.[20]

(vi) Bankruptcy Court's Post-Confirmation Jurisdiction. [Pet. p. 23-26]

Bankruptcy Code §1142(b) provides that the Bankruptcy Court may direct the debtor or any other necessary party to perform any act necessary for the consummation of the plan. Article 14 of the Plan also reserves the jurisdiction of the Bankruptcy Court with respect to any issues concerning the implementation of the Plan. Notwithstanding this specific authority, the Petitioners have consistently challenged the post-confirmation jurisdiction of the Bankruptcy Court and numerous appeals of Bankruptcy Court Orders are pending before the District Court.[21] The

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[19]*See* Bankruptcy Code §1123(a); *In re Schultz*, 69 Bankr. 629, 630-31 (D. S.D. 1987).

[20]*Holywell Corp. v. The Bank of New York*, opinion dated March 18, 1988 in 11th Cir. Case No. 87-5195 [App. 200a].

[21]*See, e.g., Holywell Corp. v. Smith*, Appeal Nos. 88-0373 and 87-2315-Civ-Scott (consolidated appeals from Bankruptcy Court Orders directing Petitioners, Holywell and Gould, to dismiss a Virginia action brought by Twin and citing Gould for contempt); *Holywell Corp. v. Smith*, Appeal No. 88-0151-Civ-Aronovitz (an appeal from a Bankruptcy Court Order holding that the Bank was not an undersecured creditor); *Holywell Corp. v. Shutts & Bowen*, Appeal No. 88-0644-Civ-Kehoe (an appeal from a Bankruptcy Court Order awarding attorneys' fees); *Holywell Corp. v. City Nat'l Bank of Miami*, Appeal No. 88-0682-Civ-Nesbitt (an appeal of a Bankruptcy Court Order directing the transfer of a real estate tax escrow fund).

Petitioners have preserved their right to contest the post-confirmation jurisdiction of the Bankruptcy Court by filing and actively pursuing these appeals.

(vii) Alleged Improper Application of Substantive Consolidation. [Pet. pp. 26-28]

Substantive consolidation of the estates of the Petitioners is a pure legal issue which was subject to close scrutiny by the Bankruptcy Court and the District Court. The District Court considered the Petitioners' arguments in opposition to substantive consolidation and ruled as follows:

> Having closely reviewed the findings of fact and conclusions of law entered by the Bankruptcy Court, and having considered the briefs and oral argument of counsel for the parties, the pertinent portions of the record on appeal, and the applicable law, it is the conclusion of this Court that the order imposing substantive consolidation upon the estates of the five debtors, and that portion of the Confirmation Order which adopts this ruling, was proper and correct as a matter of law and was based on sufficient factual findings which were not, themselves, clearly erroneous.

In re Holywell Corp., 59 Bankr. 340, 347 (S.D. Fla. 1986).

(viii) Issue of Undersecurity. [Pet. pp. 28-29]

The Petitioners' argument that the Bank was undersecured is another legal issue which has been argued and determined in other forums.

In response to the Bank's contractual claim for attorneys' fees, the Petitioners argued that Section 506 of

the Bankruptcy Code limited the Bank's right to reimbursement for those fees. The Bankruptcy Court rejected this argument, and an appeal is pending.[22]

Petitioners also filed a motion seeking, in part, an order "clarifying and confirming" that the Bank was undersecured. On December 18, 1987, the Bankruptcy Court issued an order finding that "[t]he Bank was not an undersecured creditor in these reorganization proceedings."[23] Petitioners appealed this Order to the District Court, and this appeal is still pending.[24]

In summary, the Petitioners' arguments in support of mandamus, as analyzed in sub-points b(i) through b(viii) above, reveal four indisputable conclusions. First, all of these arguments are directed at alleged substantive legal errors made by the Bankruptcy Court. Second, all of the Bankruptcy Court's rulings have been reviewed on appeal or appeal is pending. Third, to date no Court has reversed any ruling of the Bankruptcy Court on these issues. Finally, while the Petitioners continue to assert that the Bankruptcy Court's rulings were wrong on the merits, whether the Bankruptcy Court was correct is irrelevant to this proceeding. These same substantive rulings cannot constitute the "exceptional circumstances" contemplated by Rule 26 because they do not establish the "usurpation of judicial process" or "clear abuse of discretion" by the Bankruptcy Court.

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[22]*Holywell Corp. v. The Bank of New York*, Case No. 87-0969-Civ-Nesbitt.

[23]*In re Holywell Corp.*, Bankr Case Nos. 84-01490-94, Adv. Pro. No. 87-0523-BKC-SMW, order dated December 18, 1987.

[24]*Holywell Corp. v. Smith*, Appeal No. 88-0151-Civ-Aronovitz.

(c) The Petitioners Have Not Established that Adequate Relief Cannot Be Had in Any Other Forum or From Any Other Court.

The Petitioners are not entitled to the issuance of a writ of mandamus because relief from the alleged improper conduct of the Bankruptcy Court has been available or presently is available in other procedural forms or before other courts.

(i) The Pending Petition for Writ of Certiorari

On page 15 of their Petition, the Petitioners state that:

> [T]he Eleventh Circuit's panel, in dismissing their appeal from the Confirmation Order on grounds of mootness, improperly concluded that substantial consummation precluded effective relief, sanctioned the Bankruptcy Court usurpation of power, conduct violative of due process, and action nullifying the rules of procedure for trial without a jury for the purpose of preventing effective appellate review of this case on the merits.

Petitioners claim that because the Court of Appeals "prevented effective appellate review of this case on the merits," they are entitled to an extraordinary writ of mandamus. However, the appropriate relief from the decision of the Court of Appeals is to petition this Court for Writ of Certiorari. This is exactly what the Petitioners have done.

It is well established that the availability of alternative, less extreme relief, will warrant denial of a writ of mandamus. *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976). It is also clear that a petition

for writ of certiorari is an adequate alternative to the remedy of mandamus. *In re Nat'l Labor Relations Bd*, 304 U.S. 56 (1938); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943).

The Petitioners' adequate and sole form of relief with respect to all claims relating to the Confirmation Order is the Petition for Certiorari. The appeal of the Confirmation Order has proceeded through normal appellate channels for almost three years. To grant the Petitioners' Writ of Mandamus would be to ignore the careful and well reasoned holdings of the District Court and Court of Appeals which have provided Petitioners a forum for review of the alleged improper actions of the Bankruptcy Court. In addition, the granting of a Writ of Mandamus is improper at this time because it would, in effect, directly conflict with this Court's review of the Petition for Certiorari.

(ii) The Pending Review of Ancillary Rulings of the Bankruptcy Court.

In addition to rulings of the Bankruptcy Court which are part of the Confirmation Order, the Bankruptcy Court has issued orders, cited by the Petitioners as examples of conduct subject to mandamus, which have been reviewed, or are subject to review, by the appropriate appellate courts.

These ancillary proceedings are set forth herein [Point II(b)(i)-(viii)], and it is clear that they have provided or continue to provide an adequate alternative forum to the relief sought by the Petition for Writ of Mandamus.

(iii) The Prior Petition for Writ of Prohibition and Writ of Mandamus Filed With the Eleventh Circuit.

On December 23, 1987, the same Petitioners filed a Petition for a Writ of Prohibition and Writ of Mandamus

with the Eleventh Circuit Court of Appeals. That Petition was based upon the same alleged misconduct by the Bankruptcy Court. A Panel of the Eleventh Circuit unanimously denied the Petition for Writ of Prohibition and Writ of Mandamus. *In re Gould*, 11th Cir. Case No. 87-6105, Opinion dated January 22, 1988 [App. 1a]. In cases where the Circuit Court of Appeals denies a petition for a writ of mandamus, the denial of the petition can be appealed to the Supreme Court. *See Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir 1979), *cert. denied*, 441 U.S. 907 (1979); *In re Attorney General of the United States*, 596 F.2d 58 (2nd Cir. 1979), *cert. denied*, 444 U.S. 903 (1979); *United Stated v. Dooling*, 406 F.2d 192 (2nd Cir. 1969), *cert. denied*, 395 U.S. 911 (1969).

The Petition for Writ of Mandamus is replete with claims of error by the Court of Appeals in refusing to vacate orders of the Bankruptcy Court. Indeed, if the arguments and examples of judicial misconduct cited by Petitioners are to be taken seriously, the Petition for a Writ of Mandamus should not only be directed at Bankruptcy Judges Thomas C. Britton and Sidney M. Weaver, but should be directed to every Judge of the District Court and Eleventh Circuit Court of Appeals that allegedly neglected their judicial duty in failing to exercise proper supervisory control over the Bankruptcy Court.

By failing to petition this Court to review the denial of their prior Petition for a Writ of Prohibition and Mandamus, the Petitioners failed to pursue an alternative and less drastic remedy. Pursuant to Rule 26, this is a sufficient reason for this Court to deny Petitioners' request for Writ of Mandamus.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Mandamus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of July, 1988, a true copy of the foregoing was mailed to:

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